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Supreme Court of the United States

OCTOBER TERM, 1946

No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

No. 344

STATE OF MAINE, STATE OF NEW HAMPSHIRE, STATE OF VERMONT, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 345

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BEAVER, MEADE AND ENGLEWOOD RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE STATES OF NEW YORK DELAWARE, INDIANA, MARYLAND, MICHIGAN, NEW JERSEY, OHIO, WISCONSIN and THE COMMONWEALTH OF PENNSYLVANIA, APPELLANTS.

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In large part the main brief for these appellants contains their answers to the arguments in the briefs of the several appellees. In other words, if the Court, after reading the briefs of appellees, will again turn to the main brief of these appellants, it will there find their replies to most of the arguments by which it is sought to persuade the Court that the decision of the lower court and the Commission's orders should be upheld.

However, both in regard to the general tenor of the briefs for the appellees and also in regard to certain contentions which are advanced therein, a few further comments may be pertinent and helpful to the Court.

I

General comments on opposing briefs.

There are several features which are common to the briefs of all the parties who here seek to sustain the lower court's decision and the Commission's orders.

A. No serious attempt is made by any appellee to argue that the class rates charged for transporting freight between points in Official territory, when considered as compensation for the service for which they are paid and judged in relation to the rate structure and conditions in Official territory, are unreasonably low in violation of Section 1. Nor could such an argument be made in the light of the Commission's preliminary findings and of the record, which show that the rates are highly profitable. Indeed, the perfunctory ultimate finding included by the Commission in its supplemental report that the intraterritorial class rates within Official territory are less than just and reasonable rates in violation of Section 1(4) and (5) (a) of the Interstate Commerce Act (Petition, p. 158) is hardly referred to in appellees' briefs. To the extent that any attempt is made to support this perfunctory ultimate

finding, it rests entirely upon a comparison of the Official territory class rates with the class rates published by the carriers in other territories rather than upon any claim of inadequacy of the class rates within Official territory considered by themselves.

B. The arguments in support of the Commission's authority to order an increase in the class rates within Official territory rest practically entirely upon contentions as to its power to require the removal of undue prejudice and preference (referred to generally as "discrimination") in violation of Section 3(1). The discussion of these contentions, however, and frequent remarks in the briefs calmly assume the existence of discrimination, whereas one of the principal questions before the Court is whether the Commission's reports contain preliminary findings of fact essential for the support of an ultimate conclusion that in charging the existing class rates, the railroads in Official territory violate Section 3(1) of the Act. It is obviously futile to argue that the Commission has the broad powers claimed for it to remove discrimination unless its reports and the record support an ultimate finding that discrimination exists.

C. Although all appellees urge that the Court is bound by the findings of the Commission, a large part of the discussion in the opposing briefs is devoted to evidence plainly rejected by the Commission and not embodied in findings in its reports and constitutes argument which might be urged before the Commission but is not properly addressed to this Court.

II

Points which are unchallenged in the opposing briefs require reversal of the District Court's decision and a decree annulling the Commission's orders.

Repeating to some extent but in different form the foregoing comments, the Court, after reading appellees' briefs, will note that they leave unchallenged the following grounds of attack upon the Commission's orders, which alone call for their annulment.

A. Although the Commission's orders requiring an increase in the class rates charged for transportation within Official territory rest in part upon an ultimate perfunctory finding that these rates are less than minimum reasonable rates in violation of Section 1(4) and (5)(a), no denial is or could be made that:

(1) There is no finding that the present class rates for transportation within Official territory are non-compensatory;

(2) There is no evidence which would support such a finding;

(3) The cost evidence heavily relied upon by the Commission indicates that the class rates are highly profitable to the railroads of Official territory;

(4) There is no finding and no evidence which would support a finding that the existing class rates in Official territory threaten a rate war which would deplete the revenues of the carriers and impair their ability to render adequate service or would destroy other carriers;

(5) There is no finding and no evidence to support a finding that the class rates in Official territory actually charged for the transportation of shipments moving within that territory, although lower than the

corresponding class rates published in the tariffs of the Southern and Western railroads, are really lower than the freight rates actually demanded or charged by the railroads in the South and West for the transportation of the same freight either within those territories or from those territories to Official territory.

B. To the extent that the Commission's orders requiring an increase in the class rates charged for transportation within Official territory purport to rest upon an ultimate finding of undue preference and prejudice in violation of Section 3(1), no denial is or could be made in the opposing briefs that

(1) There is no preliminary finding and no evidence which would support a finding that the differences in the class rates represent differences in the freight rates actually demanded or charged for transportation within Official Territory and for transportation of the same freight from the South and West to Official territory, or that the evidence shows that all but an insignificant portion of the interterritorial movement has the benefit of exception or commodity rates and thus negatives the possibility of such a finding;

(2) The findings made by the Commission and embodied in its reports with respect to the evidence as to the effect of freight rates upon the shipments of individual shippers, their ability to reach common markets, the development of their businesses, and the industrial growth of the South and West, represent findings by the Commission that the differences in the levels of the class rates have not been the cause of substantial injury to the South or to the West as territories or to individual shippers or industries therein;

(3) The Commission's orders requiring an increase in the class rates in Official territory, which are already profitable, are inconsistent with and violate the

requirement of Section 15a (2) that the Commission, in the exercise of its power to order just and reasonable rates, shall "give due consideration, to the need * * * in the public interest, of adequate and efficient railway transportation at the lowest cost consistent with the furnishing of such service;"

C. The cost computations on which the Commission placed substantial reliance do not represent the costs of handling class rate freight, but are averages of the costs of handling all freight;

D. Although the Commission purports to predicate its orders requiring an increase in the Official territory class rates in part upon the fact that the average rates of return of the Official territory railroads upon their property investments have been slightly lower than those of the Southern carriers, there is no finding and no proof that this is due to the class rates or that an increase in the class rates would increase the rate of return.

Apart from all other angles of the case, it is submitted that these fundamental points alone, which appellees do not appear to challenge, constitute sufficient grounds for enjoining the Commission's orders because there can be no valid ultimate finding of violations of either Section 1 or Section 3 in the absence of the foregoing preliminary findings, which are completely lacking and for which there is no evidential basis in the record.

III

The argument of appellees that the 1940 amendments did not change the substantive law, except to enlarge the list of those as to whom undue prejudice and preference was prohibited, does not support the Commission's orders, but instead only emphasizes the legal error inherent in the decision of the court below and in the Commission's action, since it is clear that the Commission, and certainly the lower court, erroneously regarded the 1940 legislation as changing the law.

The brief for the United States and the Interstate Commerce Commission apparently seeks to convey the impression that there is substantial agreement between appellants and appellees on major issues and controlling principles and that, since this is so, the conclusion contended for by appellees must be the correct one. But this is plainly a *non sequitur*. If there is agreement on certain important propositions of law, this only emphasizes the conflict between the parties as to their application here. And it is submitted that the application made and the inference sought to be deduced by appellees from these propositions as to which agreement is claimed are unsound and in contravention of the facts.

Perhaps the principal question of law is whether the amendment made to Section 3 of the Act and the Ramspeck Resolution wrought a major change in the applicable law and rendered rates unlawful which were entirely law theretofore.

It is said in the brief for the Commission and the United States, at pages 66 ff., that by the 1940 amendment to Section 3 and the so-called Ramspeck Resolution, Congress did *not* and did not intend by legislative fiat to require nationwide uniformity of class rates and did not

impose a mandate upon the Commission to bring about such uniformity or an approach thereto. With this we agree. It is, moreover, the position of these appellants that the 1940 amendment to Section 3 did not change the requirements for a determination that rates produce undue prejudice and preference in violation of Section 3 but merely added regions, districts, or territories to the list of parties or things between which discrimination was prohibited. Indeed, had it not been for the decision of this Court in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, narrowly construing the word "locality", these appellants would be inclined to the view that the 1940 amendment was unnecessary and it is their conception that it merely added language to give to Section 3 the effect which it was generally assumed that it already had prior to the decision in the *Texas & Pacific* case. Hence as we argue, and as the United States and the Commission apparently agree, there was no more a mandate upon the Commission to bring about nationwide uniformity of class rates after the 1940 amendment than there was before. Class rates were no more unlawful because on different levels in different territories after that amendment than they were prior thereto. We contend, further, that to sustain a determination of undue prejudice and preference as between regions, districts, and territories the same general character of preliminary findings and of evidence was required as had always been held essential to sustain a determination of a violation of Section 3(1) as it was prior to 1940.

But the important point is not whether counsel for appellants and counsel for appellees now by their briefs agree that the 1940 legislation worked no fundamental change in the law. The question is whether the court below and the Commission conceived that the law had been changed and predicated their decisions on such a conception.

As for the lower court, it is plain from its opinion that it regarded the law as changed and based its action in upholding the Commission's orders upon its view that rates which were lawful before were rendered unlawful by the 1940 legislation, and that such legislation empowered the Commission to declare rates in violation of Section 3 of the Act without preliminary findings of facts previously held to be essential to such a determination. The lower court, in its opinion said (R. 1432, 3):

> "We think Par. 3(1) as thus amended does add new factors to be taken into account by the Commission in determining, under the old and well recognized principles which were before guides to decision in such matters, whether existing rates are unlawful. These new factors are whether such rates are unjustly preferential, prejudicial and discriminatory as between regions, districts or territories; and, in our opinion, Par. 3(1) now empowers the Commission to find such rates unlawful even though they would have been lawful in the light of all relevant considerations before the amendment. We may, indeed, take it for granted that they were lawful previous to the amendment since they had been in the main the result of comparatively recent investigations and orders of the Commission."

It is equally clear that the Commission was moved to its determination by a belief that the 1940 legislation had changed the essentials of a finding that Section 3 is violated where the prejudice and preference alleged are between "territories", and that in such a situation it had received a mandate different from any under which it had previously functioned. The Commission said (pp. 691-692, R. 306-307):

> "Considering the breadth of the language used in the amendments here under consideration, the evils

sought to be cured by this legislation, the history of the times when the law was amended, as well as the statements of the legislators as to the purposes of the amendments—all proper aids of statutory interpretation—it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country."

And its view of the law as so amended, was stated by it, in language quoted by the lower court (R. 1433):

> "'By the amendment to the substantive antidiscrimination provisions of section 3(1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate entities, were brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that *such discriminations as those mentioned* which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, if not justified upon proper consideration of recognized elements of rate making *applied in the light of the amended law* are unlawful and should be corrected.'" (Italics added.)

This is certainly a statement of the supposed essentials of a determination that rates violate Section 3 far different from any previous interpretation of that Section. It had never been held before that rates were *prima facie* in violation of Section 3 because different, or that if the

different rates resulted from "differences in the method of distributing the general rate burden", a determination that Section 3 was violated was required unless the rate differences were "justified upon proper consideration of recognized elements of rate making." On the contrary, it was the well settled law that mere difference was not discrimination, that differences resulting from differences in the rate structures *were* justified, and that there could be no determination of a violation of Section 3 without preliminary findings that the different rates were affected by and charged under substantially similar conditions and that the differences were the cause of substantial injury to the party alleged to be prejudiced or substantial benefit to the party claimed to be preferred.

But it is plain here that the Commission conceived that merely because on different levels in the different territories the class rates were at least *prima facie* unlawful and that the burden of proof was upon those who sought to defend them, notwithstanding that the Commission had itself prescribed the rates. It is plain also that the Commission conceived that because of the 1940 legislation it should hold the rates unlawful without any findings by it or evidence of facts such as had previously been held essential to a condemnation of rates as violative of Section 3.

In no other way can the Commission's finding of a violation of Section 3 be explained because of the obvious absence from the reports of findings of fact heretofore always regarded by the courts and the Commission itself as essential to such a determination.

Thus the Commission's report will be examined in vain for any finding that the difference in levels of the class rates has been or is the cause of substantial injury to Southern and Western territories, as such, and of substan-

tial preference and benefit to Official territory.* Again, there is no finding that the class rates on their differing levels are charged for the transportation of the same or competing freight in the several territories and the Commission's findings clearly negative such an assumption. Neither is there a finding that the different conditions and considerations and different characters of the rate structures in the several territories, which led the Commission itself to prescribe the class rates on their present differing levels in each of the several territories, have changed so that there is now a substantial similarity of circumstances and conditions affecting the class rates.

It is submitted, therefore, that the agreement of counsel for the United States and for the Commission that the 1940 legislation did not change the substantive law as to the essentials of a determination of unlawful prejudice and preference in violation of Section 3 of the Act supports appellants' contention that the decision of the lower court and the orders of the Commission rested on errors of law.

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* This point will be discussed further presently. It is pertinent to observe that counsel for the United States and the Commission agree therewith because at page 125 of their brief they recognize the absence of any such finding and endeavor to compensate for it by reference to evidence which they argue would have warranted such a finding.

IV

Appellees' argument that the findings of the Commission, claimed to sustain its orders, were supported by substantial evidence is unsound both because the argument fails to distinguish between rates which are published but not charged and rates which are actually charged for transportation, and also because, in fact, the Commission did *not* make the findings suggested, so that appellees' argument is really that this Court, in order to sustain the Commission's orders, should accept their view of certain evidence and make findings which the Commission declined or failed to do.

A. The differences in the levels of the class rates do not represent differences in the rates charged or in the rates under which "movements" of freight occur.

Beginning on page 86 of the brief for the United States and the Commission, there is discussion of what are referred to as the six major findings of the Commission which are claimed to support its conclusion that the conditions within the different freight rate territories do not warrant the existing differences in class rates. The first ten pages are devoted to tables and statements of figures to support the caption that "Class rates within Southern and Western territories, and from these territories to Official Territory, are much higher, article for article, than the rates within Official Territory."

We must remind the Court that all of these figures are figures as to the class rates published in the tariffs and do not represent comparisons of rates actually charged. This caution is necessary because the language of the brief, doubtless through inadvertence, may convey an incorrect impression in this regard. For example, on page 88, reference is made to "comparisons for interterritorial

movements" and there are other references to the rates for "movements." Thus, it is said on page 88 that

> "On a movement of 800 miles within Official Territory, the table above shows that a rate of $1.60 per 100 pounds applies on first class traffic, while for the same distance in Southern Territory, the rate is $2.22."

This is entirely misleading, however, if it is construed as meaning that in the case of the commodity for the transportation of which for a distance of 800 miles in Official territory a rate of $1.60 is charged, the rate actually charged for transportation for the same distance in the South is $2.22. As pointed out in appellants' main brief, there is absolutely no finding and no evidence to support a finding that the differences in the levels of the class rates indicate the differences, if any, in the freight rates actually charged. Again, on page 91, referring to the fact that the Official Classification classifies at first class 2,092 items "each of which moves at a rate of 80 cents for a haul of 200 miles", it is said that in the Southern Classification "2,075 of these 2,092 articles are classified first-class, moving at a rate of $1.12 for 200 miles." There is, however, no finding and no evidence that if these 2,075 articles or any of them are shipped for 200 miles in Southern territory the freight rate charged thereon is $1.12.

The point here made is of great concern to these appellants. If it be the law that a difference in freight rates as between territories constitutes undue prejudice and preference in violation of Section 3 or renders the lower rates unlawfully low in violation of Section 1 and the higher rates unlawfully high in violation of the same section, then this can only be so with regard to the rates actually charged. The feature of the Commission's orders to which appellants primarily object is their requirement

that the class rates for transportation within Official territory be increased 10 per cent. It would be grossly unfair, under a claim of accomplishing an approach to uniformity, to require shippers and receivers in Official territory to pay, in addition to their present rates, which are clearly profitable to the railroads, many millions of dollars of additional freight charges in increased rates which they actually pay in order to bring about equality with rates which shippers in the South and West do not pay because lower exception or commodity rates have been provided for them.

There follow at pages 98 to 127 examples of what are referred to as "specific class rate inequalities in concrete situations, of which, as the Commission found, there was 'abundant evidence' ".

The language quoted must obviously be intended to convey the impression that the examples cited were actually found by the Commission to afford "abundant evidence" of rate inequalities due to differences in the levels of the class rates in the several territories. Reference to the page of the record cited will show, however, that such an impression is not justified. At the page cited the Commission was discussion not the class rates, but the classification ratings and the differences in ratings of various commodities in the several territories. The Commission said:

> "Abundant evidence has been received showing that the differences in classification ratings compel shippers, in each of the classification territories, to pay on certain articles transportation rates that are relatively higher than the rates paid on the same articles by shippers in one or both of the other territories, considering present class rate levels in the respective rate territories."

Of course the Commission's interim orders, whose validity is challenged in these suits, were not directed to

the classification ratings and the Commission made no order whatsoever with regard thereto, leaving the carriers to work out a revision of their classification ratings. Hence, the finding of the Commission, from which the words "abundant evidence" were quoted, had nothing to do with the issues here, which are whether the differences in the levels of the class rates result in undue prejudice and preference in violation of Section 3 and whether the rates are unjust and unreasonable rates in violation of Section 1. Indeed, after the language quoted the Commission went on to say

> "In fact, on many articles a shipper in a lower rated territory must pay higher rates than one in a higher rated territory, owing to differences in classification ratings."

In other words, although the first class rate in Official territory for a given distance may be lower than the first class rate for the same distance in the South and West, a shipper of a particular commodity in Official territory may actually pay higher freight rates than a shipper of the same commodity in the South or West because of the fact that the article is accorded a lower classification rating in the South or West than in Official territory. In other words, the difference in the levels of the class rates does not mean or cause a corresponding difference in the freight charges actually paid.

B. Since it is not the function of the Court to make findings to sustain the Commission's orders when the Commission itself failed to do so, appellees' contention concerning, and their references to the evidence, are irrelevant here since the Commission has properly not regarded the evidence as justifying findings.

Beginning on page 98 of appellees' brief, there are set out (with record references) a series of examples which

are supposed to demonstrate "how discriminatory and unreasonable the class rate structures are" (p. 126).

The first comment upon these examples is that although they are cited under a caption (p. 86), beginning with the words "The findings of the Commission" (as if to suggest that the Commission actually found the existence of these various instances as examples of unreasonableness, prejudice or injury caused by the differences in the levels of the class rates), the Commission itself actually made no finding whatsoever to that effect. Even had the Commission unwittingly ignored the testimony to which the examples refer, and, through error or oversight, had failed to make findings in accordance with the description of the testimony set out in appellees' brief, it would still not be the function of this Court to create support for the Commission's orders by itself making such findings. The law is well settled on this point.

In *Florida* v. *United States*, 282 U. S. 194 (1930), this Court stated (p. 215):

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. *In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.*" (Italics added.)

This language was quoted in *United States* v. *Chicago, M. S. P. & P. R. Co.*, 294 U. S. 494, at pages 504 and 505.

The fact is, however, that the Commission did not overlook the testimony as to the various examples listed in appellees' brief. Instead, in its report, it analyzed and summarized all of this testimony and its discussion thereof plainly indicates that it rejected the evidence as proof of any discrimination or injury because of the differences in levels of the class rates and particularly as any proof of discrimination against Southern and Western territories as a whole and in favor of Official territory as a whole. We refer the Court to pages 615-619, 650-651, 665-671 of the Commission's report (R. 230-234, 265-266, 280-286).

For example, with regard to examples of differences in the levels of the class rates as between Official territory and the Southwest the Commission found (p. 665; R. 280):

> "We have referred to the fact that a comparison of first-class rates within or between territories does not, in most instances, reflect the differences between the rates on which the traffic moves. That observation is particularly suitable to the Southwest. The extent to which exceptions have been published within, and to and from, that area is not specifically shown of record, but there is general testimony to the effect that the class rates in issue move only a small proportion of the total traffic."

And it found further (p. 666; R. 281):

> "* * * Although the proportions of traffic moved at class, exception, or commodity rates between southwestern territory and other territories vary, a great preponderance of the traffic, except from official territory, moved at commodity rates. The levels of the commodity rates are much below the class-rate levels.
>
> "The foregoing description of the rate evidence in-

troduced includes the rate evidence introduced by the Committee. Additional rate evidence was introduced by members of the committee, by a witness representing the Fort Worth Freight Bureau, Fort Worth Chamber of Commerce, Texas Cottonseed Crushers' Association, Southwestern Peanut Shellers' Association, West Texas Chamber of Commerce, Freight Rate Equality Federation and by witnesses for Railroad Commission of Texas, Arkansas Rice Traffic Bureau, and El Paso Freight Bureau. Their rate evidence did not deal with the class rates in issue, but with rates on specific commodities which had been established either as exception or commodity rates.

"In some instances, commodity rates within the Southwest or from or to the Southwest are lower than the rates on like traffic for equal distances within official territory."

Counsel for appellees, having set out the "examples" in their brief, thereafter admit somewhat guardedly that the Commission in its findings did not adopt these examples as proof that the differences in the class rates had the effects claimed for them. At pages 125-126, they say:

"It may be conceded that these summaries by the Commission are not always as complete or illuminating or helpful as they might be. Therefore in this brief the statements have been based on the record itself and the illustrative material summarized above should certainly demonstrate beyond any doubt how discriminatory and unreasonable the class rate structures are, both in general levels and in particular situations."

The present case affords a striking example of the soundness of the decisions previously cited, holding that it is not the function of the Court to search the record to make findings where the Commission has not done so. The unwarranted consequence which would flow from an attempt of

the Court to make findings for the purpose of sustaining an order of the Commission which the Commission itself has apparently judged not warranted by the evidence are plainly apparent here. Certainly the Court should not take the statements in appellees' brief with regard to the so-called "specific class rate inequalities" as a substitute for findings by the Commission, when an analysis of some of these samples will demonstrate why the Commission rejected them and made no finding that they constituted instances of undue prejudice and preference or unjustness and unreasonableness of the rates or of injury brought about by differences in the levels of the class rates.

Thus the very first example on page 98 of appellee's brief cites rates for the transportation of gas black from the Pennsylvania oil fields and from Amarillo, Texas, but an examination of the record will show that the rates from Amarillo which were cited were not class rates (R. 2794, 2795, 8607). Moreover, the witness for the Southwestern Steering Committee who gave the testimony concerning these rates said (R. 2801):

> "Q. Is this submitted to show that in your judgment those rates are too high? A. No. I just show the rates."

It is no wonder that the Commission made no finding based upon this testimony.

In the next paragraph of the brief it is said that "oil well supplies move on class rates". but the record shows that the rates from Tulsa, Oklahoma, are not class rates (R. 8608, 8609), so that the differences in the rates are not due to differences in the class rates in the several territories.

The next instance cited on page 99 of the brief is that of a Kansas manufacturer of coal preparation plants and washeries. The brief asserts that this manufacturer

"must absorb in competitive bidding the differentials in class rate levels which favor the manufacturers in Official territory" and that "solely because of this rate inequality, this company is considering moving its plant to Cincinnati, Ohio, where possible sites for a new location have been offered in order to get the lower Official rates." If the Court should adopt appellees' interpretation of the evidence it would give thereto a greatly different effect than did the Commission, which said (p. 673; R. 288):

> "Only three commercial witnesses, speaking for individual establishments in the Southwest and western trunk-line territory, testified in this proceeding. These were a steel company at Denver, a manufacturer of coal-washing machinery at Pittsburg, Kans., and a lamp and stove company at Wichita. The representatives of the two manufacturers last named testified that a great preponderance of their products was shipped to official territory, but neither complained that the rate adjustment had discouraged or barred their enterprises from locating where they are."

The Commission, although summarizing at considerable length the various contentions of representatives of Western territory, did not consider the testimony of the "Minnesota traffic expert", referred to at considerable length at pages 100 and 101 of appellees' brief, worthy of specific mention. It did say, however, as previously indicated, that "only three commercial witnesses, speaking for individual establishments in the Southwest and western trunk-line territory, testified in this proceeding" (p. 673, R. 288). This conclusion covers also the examples with regard to Iowa and Kansas, set forth at pages 101 and 102 of the brief. Moreover, examination of the record pages cited in connection with the reference to the testimony of "an Iowa traffic expert" indicates that none of the shippers in the territory referred to shipped at

class rates in competition with shippers in Official territory.

The Commission did specifically refer to the testimony of the manufacturer of heating appliances cited at page 101 of the brief and found that both he and the manufacturer of coal washing machinery at Pittsburg, Kansas, previously referred to, had testified "that a great preponderance of their products was shipped to Official territory, but neither complained that the rate adjustment had discouraged or barred their enterprises from locating where they were". Examination of the record will show that the Kansas manufacturer of heating appliances testified definitely that he was satisfied with his out-bound rates and did good business in Official territory (R. 3239, 3242, 3243).

During the hearing itself Commissioner Aitchison indicated, with regard to some of the statistics and rate and distance comparisons presented by the "Iowa traffic expert", referred to on pages 102 and 103 of the brief, that they had little relation to reality and remarked that since there was no movement for some of the distances shown "we might as well take the distance to the moon" (R. 3023).

With regard to the testimony of the Western "shipper interests" as a whole, the Commission said (p. 650; R. 265):

> "All shipper interests oppose the prescription of minimum class rates; all want the railroads left completely free to meet the competition with whatever source. All oppose changes in their present commodity rates that may be designed to compensate for any readjustment required in class rates."

On page 104 of the brief for the United States and the Commission, there is reference to the testimony of a witness referred to as a "transportation and industry expert

from the University of Texas". The brief says that he "analyzed the economic effects of freight rates on five concerns in Texas" and that "his Exhibit 104 contains convincing data showing numerous rate inequalities that inhibit Southwestern industries". His testimony was not ignored by the Commission but was discussed at pages 670 and 671 of the report (R. 285, 286). It will be seen that the Commission was not impressed that the testimony of this witness indicated any substantial injury from the class rates. It found that one of the five concerns referred to by this expert "turned over its capital almost three and one-half times in 1941, made a gross or operating profit of 35.6 percent, and shipped its products in carload and less-than-carload lots to 32 States other than Texas."; Another of the companies cited had a profit of 47.5 percent and distributed its products to 33 States. The Commission found that a third company had a profit of 11.5 percent, that its freight charges were less than 5 percent of its net sales, that it procured 54.1 percent of its inbound raw materials from Official territory and shipped out 34.1 percent of its finished products to that territory. In conclusion, the Commission found that this witness did not specify what part, if any, of the freight charges on the shipments of five companies cited were at the class rates in issue, nor the kind of rates in Official territory used for comparisons: that undoubtedly many of the products did not move at class rates; and that there was "no attempt to produce a representative cross-section of Texas industries, some of whose freight charges may be lower than those in official territory".

At page 107 of the brief, reference is made to the testimony of an Atlanta freight rate expert. The testimony of this witness was discussed by the Commission at page 618 of its report (R. 233), where the Commission noted that although this witness presented evidence as to fourteen groups of commodities, "the rates on which were claimed to have been detrimental to southern shippers",

"*Only 6 of the 14 move on class rates*". As to two of these commodities, the Commission found that the manufacturers sold all of their output in the South and had never asked the railroads to establish lower rates to the North. With regard to another commodity group, i.e., electrical appliances, the Commission recalled that in the *Southern Governors Case* it had found that the class rates were not unlawful and that the ability of the manufacturer to sell these products did not depend upon the class rates. As to the other commodities moving on class rates, the Commission's conclusion was that the levels of the class rates had no effect upon the ability of the producers to sell in the North.

Nearly four pages of the brief (pp. 108-111) are devoted to the testimony of this witness with regard to the rates for the transportation of rags, ending with his statement that "There is no chance for the Atlanta manufacturer to secure any of that business." Whatever may be the truth as to this last assertion, however, the important point is that it has nothing to do with the class rates or the relationship between the levels of the class rates in the two territories because, as the Commission found (p. 618; R. 233):

> "It appears that the rates on cloth and rags about which complaint was made were not class rates."

At page 111 of the brief, reference is made to the testimony of a "Tennessee public official, a rate expert" with the statement that he "explained 'why' it is that Nashville cannot sell work clothing in the North and East, as her rates mile for mile are approximately 31.5 percent higher than her competitors' in Central Territory' " and a table of rates is shown comparing, for example, rates from Nashville to Cleveland and Grand Rapids with rates from New York City to these two points. The brief does not state, however, that the witness admitted having

no knowledge whether any work clothing manufactured in New York was ever sold in Cleveland or Grand Rapids (R. 2608, 2609) and finally, having been directed by the presiding Commissioner to answer a question which he had evaded, he admitted that he did not know whether there was any movement, under any of the rates shown, in Official territory (R. 2609).

Next, reference is made to a potato starch plant at Laurel, Mississippi. Testimony concerning this plant was given by an employee of the Tennessee Valley Authority, who, although tendered by counsel for the T. V. A. with the comment that the T. V. A. had "no financial interest in this proceeding" and was "more or less in the position of a friend of the court" (R. 2403), agreed that he could not recall appearing in any case to express views that would not benefit the Authority (R. 2403). He cited a number of plants which he had "studied" and the facts which were developed as to the potato starch plant were typical of all of them. His examination showed that the difference in the levels of class rates was no impediment to this business, first, because the business had grown and, second, because the greatest volume of shipments had been made to Lawrence, Mass., the most distant destination in Official territory (R. 2419).

The reference in the brief to the washboard manufacturer at Raleigh, N. C., is fully answered by the Commission's finding with reference thereto (pp. 615-616; R. 230-231) where it appeared that this manufacturer's business had increased substantially, that 25 per cent of his output went to Detroit, Michigan, a short distance from the location of one of his principal competitors, and that the difference between the levels of the freight rates amounted to only $13.14 on one month's business to Official territory.

Certainly it would require much more proof than this to sustain a finding that the differences in the levels of the class rates impair the ability of Southern shippers

and industries to market their products in competition with Northern manufacturers and cause substantial injury to Southern territory as a whole and to justify an order requiring an increase of $15,000,000 or more per year in the freight charges paid by shippers for transportation within Official territory and yet, as the Commission found, there was only one other direct representative of a Southern concern shipping under class rates who testified in the proceeding.

Counsel for the United States and the Commission refer to appellants' argument as a "contention that there were too few shipper witnesses" and assert that the answer to this contention "is that class rates cover a great variety of miscellaneous articles of freight and affect practically every community and every shipper and receiver of freight in the United States" (Brief, p. 126). It is argued that

> "There are tens of thousands of communities, and hundreds of thousands of shippers and receivers of class rate traffic"

and that

> "as a practical proposition, all these thousands of communities and shippers could not have been heard in this case without extending the proceedings beyond all reasonable limits"

and it is said that the Commission used "other ways of obtaining the necessary information".

Appellants do not urge that the testimony of any particular number of shipper witnesses was requisite to establish a case of undue prejudice and preference. This is, however, a case where the prejudice and preference alleged to exist are between territories. Appellees agree that a finding of substantial injury, supported by proof, is essential to sustain an order of the Commission requir-

ing an ultimate conclusion that rates violate Section 3 of the Act and an order requiring that they be changed. On page 128 of appellees' brief, counsel state:

> "We agree with appellants that a rate inequality without a showing of injury does not demand correction."

Where the claimed prejudice and preference are between territories, necessarily the "injury" must be injury to territories. Such injury if it existed could be shown by proof, if it were the fact, that differences in the levels of the class rates in the several territories cause differences in the freight charges actually paid by competing shippers shipping or desiring to ship into common markets and that such differences obstruct or impede their competitive ability and retard their sales and business growth. It is submitted, first, that to justify a finding of injury to Southern or Western territories as a whole, based upon such proof, a substantial number of instances would have to be shown to warrant an inference of injury to the territories as a whole. Especially is this so in the present case, where the method adopted by the Commission to remove the supposed undue prejudice involves requiring an increase in the class rates paid by all shippers and receivers in Official territory shipping under the class rates, whether they are in competition with Southern or Western manufacturers or not. Obviously such a drastic order, imposing increased freight costs of many millions of dollars annually upon the shippers and communities in Official territory under the guise of removing undue preference and prejudice as between territories, would not be justified if based upon the testimony of a single small shipper in the South complaining of the rates on washboards, especially if the record showed, as has been said, that under the existing rates his business has grown and prospered (R. 231). Had the Commission made a finding of injury to the South as a whole and of undue

preference to Official territory as a whole, on the basis of such evidence, it is plain that its action would be set aside as arbitrary. The question here is whether the fact that in addition to the shipper of washboards there was testimony of just one other shipper in the South shipping on class rates, the operator of a tanning plant at Andrews, North Carolina, who testified in fact that his products moved on commodity rates (R. 4003-4004), is sufficient to sustain an ultimate determination that the differences in the levels of the class rates unduly prejudice Southern territory as a whole and prefer Official territory and to sustain an order requiring a 10 per cent increase in all class rates in Official territory to eliminate the discrimination. For the Commission's own analysis of the evidence of individual shippers at pages 615 [illegible]19 of its report (R. 230-234) and quoted at pages 83 to 86 of our main brief, indicates that these were the only two shippers in the South for whom testimony was presented whose transportation charges were affected by the differences in the levels of the class rates. Indeed, as to the washboard manufacturer the Commission found that the application of the Official territory level of rates on his September shipments would have reduced his freight charges by 8 per cent. Certainly such a finding does not justify an order requiring that the class rates in Official territory be increased 10 per cent and those in the South reduced by a like percent.

As shown in appellants' main brief and as plainly apparent from the report of the Commission itself, similar comments are required with regard to the alleged proof of injury to individual shippers as between those in the Southwest and West and shippers in Official territory.

It may be remarked, further, with regard to the small number of these individual shipper witnesses that in a proceeding where there were many days of hearings in various parts of the country, the fact that only nine persons directly connected with industries in the South and

three with industries in the West and Southwest were sufficiently concerned to appear and testify at all, affords a striking demonstration that the differences in the levels of the class rates do not have the adverse and throttling effects upon Southern and Western industries and upon those territories as a whole which have been so loudly proclaimed.

It is not necessary to argue that testimony from any particular number of witnesses is necessary to prove injury to one territory and benefit and preference to another. It is sufficient here that both the paltry number who appeared and the nature of their testimony negative any inference of territorial injury and discrimination as the result of the differences in levels of the class rates.

C. Appellees' argument that the "higher class rates have impeded the development and movement of class rate traffic within Southern and Western Territories and from these Territories to Official Territory" is both invalid in itself and as a claim that the differences in class rates have caused substantial injury to the South and West is negatived by the Commission's findings.

The same general comments are applicable to the argument in appellees' brief with regard to the so-called economic testimony, the testimony of would-be economic experts as distinguished from shippers who actually pay freight charges. The Commission did not ignore this evidence but discussed and summarized it and plainly rejected it as proof that the differences in the levels of the class rates result in any injury to the South and West.

This economic testimony is discussed at pages 127 ff. of the United States and the Commission under the heading

> "Higher class rates have impeded the development and movement of class rate traffic within Southern

and Western Territories, and from these Territories to Official Territory, and thus have made all the class rate structures involved in this proceeding obsolete".

The first part of the argument under this heading is devoted to statistics and the testimony of the so-called economic experts. On this point it is sufficient to direct the Court's attention to the Commission's discussion of this evidence at pages 536-548, 650-654, 673, 674, 695-697 of its report (R. 151-163, 265-269, 288, 289, 310, 311), where the Commission plainly found that neither the class rates nor anything else had impeded or retarded the industrial development of the South.

The second part of the argument begins at page 138 with the sub-heading "Non-use of class rates". It is, of course, an undisputed fact and the Commission has found that the class rates are charged on an insignificant portion of the freight originating in the South and West, whether moving locally within those territories or shipped from those territories into Official territory.

The inference that we think should be drawn from this fact is that the differences in the levels of the class rates and the fact that the class rates as such are higher in the South and West than in Official territory cannot be the cause of unjust and unreasonable charges since they are not the rates which are charged, and cannot produce undue and unreasonable prejudice and preference for the same reason. The corresponding fact is that the railroads have provided exception or commodity rates for the transportation of the products of the South and West to a greater extent than they have done for the transportation of the products of Official territory. This is true as to interterritorial traffic as well as traffic within each of the territories. Thus, industries in Official territory shipping into the Southwest pay class rates on 22.5 per cent of their carload shipments; whereas the railroads have provided commodity rates for 95.9 per cent

of the business shipped by Southwestern manufacturers into Official territory.

Appellees attempt to meet this fact by asserting, quite without proof in the evidence and certainly without findings by the Commission, that "exception and commodity rates can never be obtained until the industry has been developed and shipments are ready to move" (Brief, p. 145). The Commission found, however, that no instance was proved "where an industry was not established in the South because of the class rate level" (p. 622; R. 237) and there was affirmative testimony by witnesses who had had experience in locating industries that they had not been deterred in locating plants in the South because of the difference in the class rate levels (R. 3464, 3871-3894, 3907, 3960, 4095-4106).

It may to the observer seem desirable or at least less complicated that the rates charged on a greater proportion of shipments should be class rather than commodity rates. However, as argued in our main brief, rates are not unlawful merely because they are commodity rates rather than class rates. The lawfulness of the commodity rates was not in issue in this proceeding and the class rates cannot be unlawful if they are not charged. Whether the rates actually charged are class rates or commodity rates or exception rates or some new kind of rates is plainly a matter of managerial discretion for the railroads rather than lawfulness of the charges, and the Commission is without authority to require that the rates charged shall be of one type rather than another.

But even if it were within the authority of the Commission to require class rates to be changed in order to induce the charging of class rates rather than commodity or exception rates upon a larger proportion of railroad traffic, this would not justify or explain all of the action of the Commission here. It may explain or justify reducing class rates in the South and West so that they

will be more attractive or will supersede the commodity or exception rates. It can certainly not be a reason justifying an increase in the class rates in Official territory. For it is too much to assume that an increase in the class rates in Official territory would increase the volume of proportion of traffic moving at class rates. Moreover, the inconsistency of the Commission's action in so far as Official territory shippers are concerned is shown by the fact that the Commission's interim orders would reduce the class rates for transportation from Official to Southwestern Trunk Line and Western territories, where at the present time the class rates are charged on 12.6, 12.3 and 22.5 per cent of the total carload traffic, and would increase the class rates charged for transportation entirely within Official territory, where the class rates are charged on only 5.8 per cent of the total traffic. Anyway the matter is looked at, the reasoning of the Commission in this respect and appellants' argument endeavoring to support it is unsound and does not sustain the interim orders.

D. The decision of the lower court and the Commission's orders cannot be sustained by the computations of comparative costs for transportation in the several territories as contended by the appellees.

The subject of costs has been discussed at pages 112 to 127 of the main brief for these appellants. Little more need be said in answer to the argument of appellees with regard thereto.

The first point which should be noted is that in dealing with costs, as in all of their arguments, appellees have predicated their contentions upon the assumption that the 1940 legislation wrought a fundamental change in the law and altered the burden of proof, not merely procedurally but substantively, so that rates in one territory were made unlawful because upon a different level from that of rates

in another territory unless the difference was shown to conform to differences of costs of transportation. The fallacy of such an argument is patent from the fact that if the class rates are unlawful because the differences in the territorial levels thereof do not correspond with the differences in the computed costs for transportation, then most of the rate structure of the country must be unlawful. The commodity rates on raw materials and finished products in the South, which are on a lower level than those within Official territory and the higher rates in Official territory, must also be unlawful. A conception of the law which would invalidate the entire rate structure cannot be sound.

Second, it may be well to repeat what was said in appellants' main brief that the cost computations do not and do not purport to show the comparative costs of transporting freight upon which class rates are charged.

The cost computations are a product of the financial figures produced by the operations of the several groups of railroads in the handling of their traffic. According to Dr. Edwards, if the average revenue from all freight of all kinds transported in a particular type of car for a given distance with a given loading equals the computed average cost for that distance, type of car and loading, then the rates are adjusted on the average to meet the carriers' revenue needs (R. 3520). The record shows that as between Official territory and the South, for example, the differences in the average revenues per ton of all freight in each territory correspond approximately with the differences in the computed average costs (R. 206, 221). This certainly indicates that the rates actually charged are adjusted with reasonable relation to transportation costs and that to increase the class rates charged in Official territory without reducing other rates which go to produce the average revenues, would conflict with the conclusion called for by the basic nature of the cost computations themselves.

The only further comment which appellees' brief invites in addition to what is said in appellants' main brief is that nowhere in the brief for appellees is any attempt made to explain how the argument as to costs sustains a finding that the class rates in Official territory should be made uniform with those in the West and should be increased in order to accomplish an approach to uniformity. The cost computations show substantially higher average cost of transportation in Western territory than in Official territory and if costs are to be controlling, there is plainly no justification for increasing the class rates in Official territory so that their level will approach uniformity with that of western class rates.

E. As to the differences in the consists of traffic.

Here again appellees' argument, following the reasoning of the Commission, emphasizes that they both rest upon the assumption that the 1940 legislation changed the law. The reasoning in the Commission's report, which appellees adopt, was that since the class rates for transportation within each territory are on a uniform level (an assumption incorrect as to Official territory, where the class rates are higher in certain sections), therefore differences between the levels of the rates in one territory and those in another territory are to be held unlawful unless it appears that there are greater differences between territories in the kinds of freight transported in each than the differences existing between different railroads in each territory.

How great a change this represents in the conception of the law upon which the Commission has heretofore acted is shown by the fact that the class rates now found to be unlawful unless justified, were prescribed by the Commission itself and that the Commission expressly found in fixing the maximum levels of the rates in each territory, that it did so in the light of the traffic and rate

structure in that territory and the differences between one territory and another in these regards. As has been pointed out, the Commission in the *Western Class Rate Case*, 164 I. C. C. 1, at page 188 said

> "Class rates in w.t.l. territory appreciably higher than in official territory are justified also by the nature and volume of the articles moving under such rates in the respective territories."

In the *Eastern Class Rate Case*, 164 I. C. C. 314, the Commission similarly indicated that in prescribing the class rates in Official territory, it fixed those rates at a lower level than the level of the class rates in the South and West because of the differences in the nature of the traffic and the rate structures in the several territories. Appellees do not argue that there is any finding or evidence that these facts have changed.

We agree with appellees' statement (p. 189) that

> "The consist problem then really resolved itself into one of providing adequate revenues for the carriers from the traffic which they transport,"

It is difficult to see, however, why it follows that the class rates in one territory, which are a part of the total rate structure and provide the carriers in that territory with their revenues from all of the traffic which they transport, become unlawful unless justified because on a different level from that of the class rates in another territory, established on a different theory in the light of a different rate structure and traffic movement. It is, of course, for the Commission to weigh the evidence on such matters. But the Commission acts arbitrarily and unlawfully if it approaches the same facts with a changed point of view and reaches a different conclusion without any finding or proof of altered conditions, or if it does so upon the assumption that the law has been changed when such is not the case.

F. As to the comparative levels of the commodity and exception rates.

Appellees' argument with regard to the differences between the commodity and exception rates in the several territories misinterprets the contentions of appellants with regard thereto and goes outside of the record for its factual basis. Reference is made to the report of the Board of Investigation and Research, reproduced as House Document No. 303, 78th Congress, First Session, for a statement that on a limited number of commodities, such as brick, cement, fertilizer, logs, etc. "there are substantial regional differences in the levels, with higher rates in the South and West than in Eastern Territory", and it is said that

> "The major premise of appellants, that commodity rates are lower in the South and West, is thus without support in the record, * * *."

Of course we do not know what study the Board of Investigation and Research made, but the record in the present case certainly shows and the Commission found that on most of the commodities listed the rates in Official territory are substantially higher, mile for mile, than the rates for the transportation of the same commodities in the South. Moreover, while the Commission said that it could not reach a conclusion from the record as to the relative average levels of the rates on raw materials generally in the South and Official territory (p. 602, R. 217), it definitely found that the rates on brick (p. 593, R. 208), fertilizer and fertilizer materials (p. 594, R. 209), coke (p. 595, R. 210), lime (p. 595, R. 210), logs (p. 596, R. 211), pig iron (p. 597, R. 212) pulpwood (p. 597, R. 212), sand, gravel, etc. (p. 598, R. 213), iron and steel scrap for certain distances (p. 599, R. 214), sulphuric acid (p.

599, R. 214) and iron ore (p. 599, R. 214) are higher in Official territory than in Southern territory.

Appellees also argue that the Commission may require changes in the class rates without changing the commodity rates, because on the authority of the so-called *Staley* case (*United States* v. *Wabash R. Co.*, 321 U. S. 403) it may proceed one step at a time in enforcing the statute. The latter proposition may be accepted, but it does not meet appellants' argument. The point which appellants urge is that the class rates are merely parts of the entire structure or pattern of transportation rates in each territory, that the territorial machinery of rate making is a necessary or logical development, at least so long as the railroads are not nation-wide systems and with few exceptions the boundaries of the territories conform to the termini of the railroads in each territory and that unless all rates are to be made uniform and are unlawful unless this is done, it cannot be said that the class rates forming a part of the rate structure of one territory are unlawful because on a different level from the class rates which are the part of a different rate structure in a different territory and serve a different purpose in providing the carriers with revenues. It was on this theory that the Commission itself prescribed the class rates in the several territories, and unless the law has been changed the principle is still valid.*

* It may be interesting, incidentally, to speculate how nationwide, or even territorial, uniformity of classifications and rates is to be achieved and maintained if the Department of Justice, which here urges it, succeeds in its actions against the railroads for violations of the anti-trust laws in their rate-making practices.

V

Appellees' argument that "interterritorial rate problems are insoluable without uniformity of class ratings and rates" is an argument against the validity of the interim orders in issue here.

The Commission determined that uniformity of class rates should await uniformity of classification ratings. The working out of a uniform classification with uniform ratings for all commodities in all territories is a matter left to the future. Under these circumstances, the argument at pages 196 to 205 of the brief for the United States and the Commission only emphasizes the impropriety of a finding that rates are unlawful because not uniform so long as the classification ratings are not uniform. Especially is this so as to the portion of the orders requiring an increase in rates in Official territory, in view of the fact that the differences in the classification ratings generally favor the other territories.

Thus, the Commission found, as previously observed, that "on many articles a shipper in a lower rated territory (Official) must pay higher rates than one in a higher rated territory (Southern or Western), owing to differences in classification ratings (R. 123, p. 508). In other words, so long as the classification and classification ratings are not made uniform, the effect of the Commission's order is to require that "on many articles" the rates which shippers in Official territory pay, which because of higher classification ratings, are already higher than the rates for the transportation of the same articles in the South or West, must be further increased, while the lower rates in the South and West are to be reduced. If this is not arbitrary action, it is hard to imagine what would be. Certainly it is without support in any theory of approaching uniformity.

VI

The arguments in the briefs for appellees confirm appellants' contention that the real purpose of the Commission's orders was to bring about a redistribution of industry. Far from sustaining the validity of the orders, the argument requires that they be held unlawful.

In the summary, beginning at page 196 of the brief for the United States and the Commission, as well as in the briefs of some of the other appellees, it is argued that regional rate making, should give way to nationwide uniformity and that differences in rate levels in different territories which for the purposes of the argument are referred to as "rate barriers", should be eliminated to the end of stimulating the industrial development of the South and West. To be sure, in order to give a semblance of respect for the decisions holding that the Commission has no authority to order changes in rates for such a purpose, it is said (p. 200) that the rate differences should be eliminated "not to change our economy, but to remove discriminatory conditions which unfairly and unlawfully prevent the possibility of change". The whole tenor of the argument, however, is that rates should be changed in order that "the low income status of the South and West may be improved by removing the barriers to industrialization in those regions" (p. 204). It is said that the differences in the levels of the class rates provide "something remarkably similar to the working of a protective tariff" (p. 204).

The argument plainly echoes the campaign of agitation which provided the atmosphere in which the proceeding was inaugurated and decided by the Commission, and it probably reflects the underlying motive of at least some members of the majority of the Commission. This, however, only serves to emphasize the unlawfulness of the

Commission's action because to the entire argument there are several conclusive answers, which are likewise applicable to the decision and orders of the Commission themselves.

First of all, the factual premise which the argument assumes and numerous statements made in the course of the argument are contrary to the true facts, both as found by the Commission and as shown by the evidence. The Commission did not find nor did the evidence as a whole show that the differences in the levels of the class rates have acted in any way to discourage or impede the industrial development of the South or West or have operated as a trade barrier to the movement of goods produced in these territories to markets in Official territory. The Commission found, as the evidence shows, that in the ten-year period from 1930 to 1940 manufacturing employment increased in the South and decreased in the North; that while Official territory had a 25 per cent decrease in the values of manufactured products, the South had an increase; that the number of wage earners in manufacturing industries decreased by 12 per cent in Official territory and increased 5 per cent in the South (p. 621, R. 236). Indeed, as the Commission found, when the Southern Governors were proclaiming to the world the virtues of the South (instead of appearing before the Commission to plead poverty in order to secure a revision of freight rates in their favor), they proudly published a statement that in a period of two years "the number of manufacturing plants in the South increased by 803 as contrasted to a decline in the rest of the United States of 3,120" (p. 622, R. 237).

In further contradiction of the argument that the differences in class rate levels have acted as a trade barrier, stimulating the industrial development of the East and discouraging that of the South or West, the Commission

found (p. 619, R. 234) that

> "The industrial development of the East is due to many factors other than transportation services and costs,"

and these factors were listed. It found that "any differences in freight charges resulting from differences in class rate levels is only a small fraction" of the destination value of manufactured goods and that "many commodities have a nationwide market" (p. 619, R. 234). The Commission found further that "no specific instance was proved where an industry was not established in the South because of the class rate level" (p. 622, R. 237).

In the second place, it is well settled that the Commission is without authority to order changes in freight rates for the purpose of inducing the location of industry at one point or in one section of the country rather than in another. (See cases cited and discussion of this point at pp. 138 to 141 of appellants' main brief.)

Finally, appellees, while arguing that freight rate barriers to industrial development should be removed, are really seeking to support the Commission's action in order to accomplish this very purpose but for the benefit of different sections of the country. This is especially so in view of the nature of the orders, whose validity is here in issue. The particular orders attacked in this suit would admittedly be of little benefit to the South and West in causing lower transportation charges in those territories, especially in the South, because of the small volume of traffic upon which the class rates are charged. The primary effect of the orders would be to impose increased costs upon doing business in Official territory. Appellees are, therefore, arguing that because, as they claim, a wider distribution of industrialization throughout the coutry is desirable, this

should be accomplished by increasing, through the mediu of increased freight charges, the costs of doing industria business in Official territory and thereby discouraging in dustries to locate or remain in that territory and encourag ing them to move elsewhere. This would indeed be using freight rates, as this Court said in *State of Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 450, cited at page 20 of appellees' brief, as "but one form of trade barriers". It is plain that the Commission has no authority to order rates increased for such a purpose.

VII

Despite arguments to the contrary in the briefs for some appellees, the conclusion is inescapable that the Commission's orders rest, in the last analysis, upon an erroneous conception of the effect of the amendment to Section 3(1) and 5(b) of the Transportation Act, 1940.

It is argued in the brief for the United States and the Commission and in those for the Southern and Western States that the Commission's decision has not been influenced by the Ramspeck Resolution, which was Section 5 (b) of the Transportation Act, 1940, and that it rested solely upon Section 3(1). However, as has been shown, all of the arguments in support of the orders and the Commission's reports themselves, because of the complete lack of preliminary findings otherwise essential to ultimate findings of violation of Sections 1 and 3, can only be explained on the ground that they assume that Congress has decreed that class rates must be uniform in all territories. Without this underlying assumption that because levels are different the class rates in the several territories are unlawful, neither the reasoning in the Commission's report nor the arguments in support of the Commission's orders overcome the absence of essential findings.

Plainly the mere addition of the three words "region, district, territory" to Section 3 did not, by itself, change the substance or effect of Section 3 except to enlarge the parties entitled to its protection. It did not alter the nature of the requirements for a finding of a violation of the section. The conclusion is inescapable, therefore, that it was either the Ramspeck Resolution or the remarks made in Congress by and to Southern Congressmen or the "groundswell of agitation" which led the Commission to believe that the law had been changed to impose the requirement of uniformity. Since neither the amendment to Section 3 (1) nor Section 5 (b) of the Transportation Act can be read as having any such effect and such a purpose is denied by the remarks in Congress other than those by and to Southern Congressmen, the situation here is plainly analogous to that in the cases involving the Hoch-Smith Resolution, where the Commission construed the resolution directing it to investigate as a mandate requiring it to order the change in rates for which there was clamor. It is immaterial here whether the Commission considered that its orders were directly required by Section 5(b) (the Ramspeck Resolution) or whether it issued its orders to enforce Section 3(1) but was led by the resolution and the popular clamor to construe the amendment of Section 3(1) as requiring uniformity of class rates where "territories" are concerned. In either event, its action was erroneous as a matter of law and its orders invalid for the same reasons, as were the orders condemned in *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658 and *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248.

Conclusion

It is submitted that the arguments of appellees do not overcome the contentions made by the appellants and that, in accordance therewith, the judgment of the court below should be reversed and the case remanded with

direction to annul, set aside, and permanently enjoin t orders of the Interstate Commerce Commission, who validity is here in issue.

Respectfully submitted,

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